

USAWC STRATEGY RESEARCH PROJECT

THE PATRIOT ACT AND CIVIL LIBERTIES: A CLOSER LOOK

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ABSTRACT

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This paper examines the provisions of the Patriot Act which were designed to increase information sharing between intelligence and law enforcement agencies, underscores the implications of their broader investigative scope with respect to our nation's civil liberties, and provides recommendations to improve future versions of this legislation. The following analysis maintains that the Patriot Act, with respect to the Foreign Intelligence Surveillance Act (FISA), designed to improve and increase information sharing between intelligence and law enforcement agencies, goes too far in its reach and includes unnecessary provisions. It is another example of legislative overcompensation, enacted in a time of crisis, similar to those of the 1950's anti-Communist era and the 1960's civil rights movement. The Patriot Act's broader investigative scope invades our nation's civil liberties and once again unsettles the delicate balance between our nation's strategy on domestic security and the civil liberties that we, as a nation and people, protect and embrace.

THE PATRIOT ACT AND CIVIL LIBERTIES: A CLOSER LOOK

The events of September 11 convinced ... overwhelming majorities in Congress that law enforcement and national security officials need new legal tools to fight terrorism. But we should not forget what gave rise to the original opposition - many aspects of the bill increase the opportunity for law enforcement and the intelligence community to return to an era where they monitored and sometimes harassed individuals who were merely exercising their First Amendment rights. Nothing that occurred on September 11 mandates that we return to such an era.

—John Podesta, White House Chief of Staff from 1998 – 2001
USA Patriot Act - The Good, the Bad, and the Sunset (Winter, 2002).

The USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) of 2001, passed quickly and overwhelmingly by lawmakers and enacted on 26 October 2001, has been characterized by Attorney General Alberto R. Gonzales as providing law enforcement agencies with the necessary and crucial tools in their efforts to combat terrorism and protect the American people.¹ Critics claim the act goes too far and “paint the Patriot Act as a caldron of abuse and a threat to civil liberties.”² There is concern about citizens losing the right of due process and being investigated or put under surveillance unknowingly, all in the name of combating terrorism. It is too easy and irresponsible to lower our standards of proof and erode basic civil liberties instead of drafting and enacting comprehensive, balanced, and effective legislation.

There is ongoing heavy debate between lawmakers and citizens about the balance of civil liberties and the need to provide national security, but that debate is often obscured by hysteria and myth. Paul Rosenzweig of the *Christian Science Monitor* states that the Patriot Act is “so broadly demonized now; you'd never know it passed with overwhelming support in the days immediately after 11 September, 2001.”³ Both critics and supporters of the Patriot Act often provide a polarizing view. You have idealists on one side who fear a complete invasion of civil liberties and realists on the other who for the most part disregard the criticism as politically motivated. Amitai Etzioni, in his book “How Patriotic is the Patriot Act”, strongly asserts that both sides, liberals and conservatives; tend to polarize the debate about the Patriot Act instead of examining the act on its own merit.⁴ It is important to put passion and emotion aside to conduct a critical analysis of the key provisions in this act.

There needs to be an objective examination of this legislation to strengthen the will of our nation instead of dividing it and making people choose sides. Also, with the President admitting the utilization of the National Security Agency (NSA) to conduct domestic intelligence operations, the Patriot Act has taken center stage. Instead of utilizing extreme rhetoric, fear,

and misrepresentation as justification to support or criticize the Patriot Act, lawmakers need to identify the positive and negative aspects of the act, draft and enact appropriate changes.

While there must be a balance between security and civil liberty, the idea that any improvement in one results in a diminution of the other is incorrect. As Paul Rosenzweig, senior legal research fellow and adjunct professor of law at the University of George Mason writes in one of his recent articles on homeland security, "America is not limited to a zero-sum game. There are effective ways to limit the ability of the government to intrude into Americans' lives while increasing security. America can and must adhere to fundamental and firm principles of limited government, and it can do so while also answering the terrorist threat."⁵ This paper examines the provisions of the Patriot Act which were designed to increase information sharing between intelligence and law enforcement agencies, underscores the implications of their broader investigative scope with respect to our nation's civil liberties, and provides recommendations to improve future versions of this legislation. The following analysis maintains that the Patriot Act, with respect to the Foreign Intelligence Surveillance Act (FISA), designed to improve and increase information sharing between intelligence and law enforcement agencies, goes too far in its reach and includes unnecessary provisions. It is another example of legislative overcompensation, enacted in a time of crisis, similar to those passed in the 1950's anti-Communist era and the 1960's investigations during the civil rights movement.⁶ The Patriot Act's broader investigative scope invades our nation's civil liberties and once again unsettles the delicate balance between our nation's strategy on domestic security and the civil liberties that we, as a nation and people, protect and embrace.

The next two sections of this paper provide an overview of both the Patriot Act and FISA, identifying their purposes and key areas with respect to the above thesis. There will then be an examination of key definitions and terms that impact the reach of the Patriot Act, followed by analysis of both the Patriot Act and FISA, historical examples of similar legislation, and recommendations for future versions of this act.

Patriot Act

The Patriot Act is United States federal legislation that was quickly drafted and overwhelmingly passed by the Senate 98-1 and the House of Representatives 357-66 in response to the terrorist acts of 11 September 2001. On 26 October, 2001 President Bush signed this bill into law.⁷ Its primary authors were assistant Attorney General Viet D. Dinh and current Homeland Security Secretary Michael Chertoff. It is a wide-reaching and comprehensive piece of legislation with 342 pages and includes 10 titles. Table 1 describes the

specific titles of the Patriot Act. It amends 15 separate criminal statutes, creating multiple new federal terrorism crimes, and greatly expands the authority of the government to conduct surveillance and searches.⁸

| Title | Subject Area |
|--------------|--|
| I | Enhancing Domestic Security against Terrorism (counter terrorism) |
| II | Enhanced Surveillance Procedures (increases powers of surveillance to various government agencies) |
| III | International money laundering abatement and anti-terrorist financing act of 2001 |
| IV | Protecting the border |
| V | Removing obstacles to investigating terrorism |
| VI | Providing for victims of terrorism, public safety officers and their families |
| VII | Increased information sharing for critical infrastructure protection |
| VIII | Strengthening the criminal laws against terrorism |
| IX | Improved intelligence |
| X | Miscellaneous |

TABLE 1. PATRIOT ACT OVERVIEW

The purpose of the act is to provide law enforcement the necessary tools to investigate and combat terrorism.⁹ The four key areas in which the act has had the most significant impact are: (1) enhancing the federal government's capacity to share intelligence; (2) strengthening the criminal laws against terrorism; (3) removing obstacles to investigating terrorism; and (4) updating the law to reflect new technology.¹⁰ It also introduces extensive changes to U.S. law, including amendments to:

- Wiretap Statute
- Electronic Communications Privacy Act
- Computer Fraud and Abuse Act
- Foreign Intelligence Surveillance Act
- Family Education Rights and Privacy Act
- Pen Register and Trap and Trace Statute
- Money Laundering Act
- Immigration and Nationality Act
- Money Laundering Control Act
- Bank Secrecy Act
- Right to Financial Privacy Act
- Fair Credit Reporting Act

The Patriot Act is a combination of the earlier anti-terrorism act called the USA Act which was passed by the Senate on 11 October, 2001 and passed by the House of Representatives on 12 October, 2001 and the Financial Anti-Terrorism Act. Its language, most importantly, includes “far-reaching modifications to the Foreign Intelligence Surveillance Act (FISA).”¹¹ It amends the 1978 FISA with respect to its laws concerning foreign intelligence and domestic criminal information, immigration, banking, and money laundering. The Patriot Act contains extensive revisions to FISA that expand law enforcement agency’s investigative powers to obtain and analyze personal information. It more easily allows investigators to maneuver between foreign intelligence gathering and domestic criminal information collection. One of the main points is the degree to which law enforcement is able to collect and analyze personal information. Finally, the Patriot Act creates new and broader definitions of terrorism, domestic terrorism, records, and the term “foreign power” that expand the act’s application and reach.¹²

Foreign Intelligence Surveillance Act (FISA)

The Foreign Intelligence Surveillance Act (FISA) developed in 1978 originally set procedures for requesting judicial authorization for electronic surveillance and physical search of persons allegedly engaged in espionage, foreign intelligence gathering, and international terrorism against the United States on behalf of a foreign government. FISA establishes “a legal regime for foreign intelligence surveillance separate from ordinary law enforcement surveillance.” In the development of this act Congress attempted to strike a delicate balance between national security interests and personal privacy rights.¹³ Most importantly, the FISA requirements for foreign intelligence collection are intentionally looser than those that apply to criminal and domestic investigations. FISA creates a specific difference between the conduct of domestic criminal investigation and foreign intelligence investigations. This distinction serves “to protect the Fourth Amendment rights of U.S. citizens in criminal investigations, requiring probable cause before a search warrant is issued and preserving freedom from unreasonable search and seizure.”¹⁴

The purpose of FISA is to regulate the collection of foreign intelligence specifically noting that counterintelligence and criminal prosecution are different. It serves as a “firewall between foreign and domestic intelligence gathering.”¹⁵ FISA application is guided by both political and judicial aims; politically, the executive branch’s authorities for intelligence collection into domestic areas in an effort to protect the nation and government, and judicially, the court’s attempts to balance the First and Fourth Amendments.¹⁶ An act that removes or limits this balance in favor of the executive branch can potentially endanger the safeguards provided by

the judiciary. The desired ends, national/domestic security, do not always justify the means, eroding civil liberties in the name of defeating terrorism. It is difficult to challenge such a moral and just cause but laws that go unchallenged potentially grow and without proper oversight go too far in their protections.

The act also establishes the Foreign Intelligence Surveillance Court (FISC) to oversee and approve requests for surveillance warrants by the Federal Bureau of Investigation against suspected foreign intelligence agents inside the United States. This secret court authorizes search warrants so long as a petition before the court asserts that the "primary purpose" of the surveillance is to gather foreign intelligence. The target has to be linked to foreign espionage, not criminal behavior. The court was primarily developed due to the executive branches' reluctant but ever increasing use of electronic surveillance and desire to protect the nation by collecting intelligence information. The FISC was designed to prevent FISA misuses by mandating the judicial oversight of intelligence actions within the United States.¹⁷ The FISA court does not prevent law enforcement and intelligence agencies from sharing information, it provides oversight and ensures the standards of proof and probable cause are being met.

Definitions

The importance of defining key words and terms cannot be over stated, especially when applied to written law. Within in any specific field, terms provide the way of seeing inside that discipline. If the definition of terms is changed, so too is the understanding of that discipline as well as the application and implicit connections that they make.¹⁸ Just as important are vague definitions and what is not clearly prescribed. Below are key definitions and terms as they apply to the Patriot Act and FISA.

Terrorism

When Congress passed the Patriot Act immediately following 9/11, we warned that the definition of terrorism was so broad that it could sweep in benign groups who were simply using tools of civil disobedience to make a political point, or even unions engaged in picketing.¹⁹

—John Conyers Jr., (D-Michigan)
House of Representatives

One of the significant differences between the Patriot Act and FISA is the definition of terrorism. Under FISA, terrorism is limited to acts that are "backed by a foreign power." The phrase *foreign power* is commonly regarded as *foreign government*. Focus on Al Qaeda after September 11 raised the issue that there are terrorists who are not backed by a foreign

government and even those who may act completely alone.²⁰ Changes in the definition have now rightfully accounted for non-state and lone actors. Terrorism, under the Patriot Act however, is further expanded and redefined as any activity that appears to be intended (1) to intimidate or coerce the government or civil population (2) to break criminal laws (3) to endanger human life.²¹ This expanded definition of terrorism is not linked to specific crimes, but covers all dangerous acts that are a violation of any federal or state law, committed to influence government policy.²² This expansive change seriously impacts citizen's First Amendment rights. "It is this broad definition that sweeps in the activities of a number of protest organizations that engage in civil disobedience, including those like People for the Ethical Treatment of Animals and Operation Rescue."²³ This definition would include those people and organizations which challenge policy and offer different opinions through the media and free speech. By utilizing the Freedom of Information Act, the ACLU discovered the FBI has been conducting surveillance of a Michigan-based peace group and an affirmative action advocacy organization after identifying them "terrorist organizations."²⁴

Section 802 of the Patriot Act also establishes the definition of a new term: Domestic Terrorism. It defines domestic terrorism "as activities that occur primarily within the United States that involve criminal acts that are dangerous to human life and appear to be intended to intimidate or coerce a civilian population or government or to affect government conduct by mass destruction, assassination, or kidnapping."²⁵ This definition now establishes the basis for FISA to be applied to U.S. citizens within the United States, blurring the distinction between criminal and foreign intelligence investigations and conduct. This is an attempt to change the status of personnel and organizations to more freely investigate and survey their normal activities in the hopes of acquiring information, criminal or terrorist related, by casting the largest possible net for the purpose of collection instead of preventing terrorist acts.

Foreign Power

The term "foreign power" would be expanded under the Patriot Act II (proposed legislation) and FISA. "Terrorist organizations and anyone thought to be affiliated with them", regardless of legal status or residence, to include Americans, would not receive any of the FISA protections normally accorded to U.S. citizens.²⁶ This provision would enable individuals not associated with a terrorist organization to be categorized for investigation purposes as foreign powers. Under this definition, if a person owns stock in a company, donates to an international assistance/non-profit organization, or is on their mailing list, they could be treated and investigated under the foreign power term.

Records

Prior to the Patriot Act, records were defined as being limited “pieces of information, such as hotel registrations, car rentals, and storage unit rentals.”²⁷ Modified by the Patriot Act, investigators may obtain and analyze a wide range of records that include anything “tangible” (including books, records, papers, documents, and other items). This substantial difference permits law enforcement agencies to access virtually any form of information in any format and quantity loosely related to the heart of an investigation.²⁸ The vagueness of the word tangible opens doors to “fishing” expeditions instead of law enforcement being required to specify its investigative intent.

The FBI’s power to demand, through the use of National Security Letters (NSL), that companies secretly turn over personal records of customers, suppliers and employees has limited review by judges and leaves companies with little recourse. Companies are compelled to provide sensitive customer information without the right to question why, seek judicial counsel or even acknowledge being directed to provide information in the first place. According to Susan Hackett, senior vice president of the Washington-based Association of Corporate Counsel, “government is looking to deputize in-house counsel and, generally, businesses,” to secretly provide a limitless unknowable fountain of information.²⁹ This right to secretly demand information from private companies breeds and recruits them to possibly become second order spies who are in direct contact with the average citizen.

Probable Cause

Probable cause is the standard by which law enforcement make arrests, conduct personal or property searches, or obtain search warrants. This term originates from the Fourth Amendment of the United States Constitution. Probable cause “is where known facts and circumstances, of a reasonably trustworthy nature, are sufficient to justify a man of reasonable caution or prudence in the belief that a crime has been or is being committed.”³⁰ Section 218 of the Patriot Act amends the FISA so the FBI can secretly conduct a physical search or wiretap primarily to obtain evidence of a crime without proving probable cause of criminal activity. Criminal activity, however, cannot be the primary purpose of FISA surveillance because if it is, FISA is being utilized as an end-around to bypass the Fourth Amendment.³¹

These definitions of terrorism, domestic terrorism, foreign powers, and records, combined with the loosening of probable cause within the Patriot Act create an inroad for broad use of secretive FISA privileges. It creates the conditions and potential for misuse against U.S. citizens when the primary objective is to collect criminal evidence instead of the prevention of

terrorist activity. "U.S. citizens qualify as foreign agents subject to clandestine searches and broad FISA surveillance" based on suspicion and association to legitimate organizations and activities.³² These are technical changes and remove the extremely complex limits of FISA's reach. FISA authorizes surveillance under fluid conditions for the purpose of foreign intelligence gathering that are unacceptable when the purpose is gathering criminal evidence.³³ Criminal investigations are held to a higher standard and therefore provide more protections that are not present under the umbrella of intelligence gathering. People should also be concerned about the vague wording of the Patriot Act. Due to its secrecy, lack of clarity, and broad reach, the act's true implications may not be fully realized for many years.³⁴ People and organizations have little recourse or awareness of the amount and degree that they are being investigated and watched. The next several paragraphs further develop these concerns and examine the implications of the Patriot Act's broadness and reach into civil liberties, its changes to law enforcement procedures, as well as the impact of the Patriot Act on FISA.

Patriot Act Analysis

The Patriot Act allows for increasingly greater authority for tracking and intercepting communications for both foreign intelligence and domestic law enforcement collection. It establishes new procedural methods for combating domestic and international terrorism.³⁵ The Patriot Act amended FISA so that foreign intelligence gathering need no longer be the "primary" purpose of the surveillance, so long as it is a "significant purpose." This may seem to be a minor change, but it is not. Because the standard for FISA approval is lower and because FISA now applies to ordinary criminal investigations if they are characterized as "national security" inquiries, the new rules and thresholds provide federal agents another avenue to circumvent the Constitution's search warrant requirements.³⁶ In other words, due to the Patriot Act, the purpose for a warrantless FISA wiretap or search can now be evidence collection for criminal prosecution or for reasons of pure suspicion instead of deliberate intelligence collection. Utilizing FISA becomes a more attractive and easier method to conduct secretive domestic criminal investigations where standards for search and seizure are lower and investigations are conducted with less oversight.

According to Deputy Attorney General James B. Comey, the purpose of the Patriot Act was to "bolster our law enforcement and intelligence capabilities".³⁷ The Patriot Act instead leads to the potential erosion of citizen's civil liberties as it expands information gathering and search and seizure through a more secretive FISA procedure instead of an open court process which provides checks and balances. Little is known about the application of the Patriot Act,

due to the secrecy clause and the secretive nature of the FISC courts, with much of the available information being what law enforcement agencies are willing, not required, to disclose.³⁸ The executive branch continues to protect this information collection process by loosely linking it to national security and preventing it from scrutiny and oversight except for being reviewed by internal executive branch agencies. By directing the Justice Department Inspector General to conduct reoccurring reviews of the Patriot Act, the executive branch merely allows for the internal review of a sensitive process that instead requires scrutiny from a disinterested and unbiased party. Stating that there has not been a single substantiated case of abuse of the Patriot Act does not justify the act or serve as a functional tool for its review and analysis. The potential of the act must be examined and if the program is clouded in secrecy, examination and any improvement could be limited. The same branch of government that participates in executing the Patriot Act should not be the one to police its use. This is a dangerous combination of authorization and oversight responsibility within the same branch of government.

This secrecy has also increased the amount and extent of unsolicited information that is indiscriminately collected, a great deal of which is from unsuspecting and non targeted victims. Due to the secrecy clause within the Patriot Act, the subject(s) of an investigation will likely never know the degree and breadth to which government agencies engage in information gathering, analysis, information storage, and information sharing across agencies and different levels of the government. Section 215 of the Patriot Act places a prohibition on disclosing any information about a FISA investigation, except if directed to produce information that has been requested by law enforcement using a FISA order.³⁹ Representative Ron Paul of Texas, one of three Republicans to vote against the Patriot Act has stated that "the worst part of this so-called antiterrorism bill is the increased ability of the federal government to commit surveillance on all of us without proper search warrants."⁴⁰ The impact means individuals or organizations are prohibited from acknowledging the existence of the order and request for information.

The Patriot Act allows federal agencies to bypass the Constitution's search warrant precondition by expanding the FISA law which created a special federal court to approve search and surveillance. It lowers the standard of purpose for an investigation under FISA from the sole or "primary" purpose to simply a "significant" purpose. "Section 218 expands the application of FISA to those situations where foreign intelligence gathering is merely a significant purpose of the investigation, rather than, as prior FISA law provided, the sole or primary purpose".⁴¹

The term significant in this case is not defined and its nebulousness could lead to both inconsistent application and abuse of FISA. This moderate use of the term significant by the government under FISA, as opposed to the stringent requirements of Title III, is warranted because FISA's provisions simplify the collection of foreign intelligence information, not criminal evidence. The accepted justification is removed where the permissive FISA provisions are applicable to the interception and collection of information relating to a domestic criminal investigation. This alteration drastically changes the constitutional balance reflected in prior legal rule that covers surveillance.⁴² It makes it possible to spread this information between intelligence agencies and domestic law enforcement agencies where the justification initially used was based on a lower standard governing foreign intelligence information gathering only.⁴³ It now becomes easier to collect both domestic and foreign information by not accurately defining the reasons for surveillance operations. It becomes easier to state that the investigation is somehow terrorist related as a sort of catch-all reasoning and justification.

Through the use of the Patriot Act the FBI has conducted clandestine surveillance on many U.S. residents for as long as 18 months at a time without proper authority or oversight. Records turned over as part of a Freedom of Information Act lawsuit point to the FBI investigating hundreds of violations related to its secret surveillance operations, which have been dramatically multiplied since the Sept. 11, 2001, for the most part without public awareness.⁴⁴ This change to investigative procedures has increased the number of surveillance cases (National Security Letters - NSL) considerably. Under the Patriot Act, the FBI issues, without judicial review, "more than 30,000 National Security Letters allowing the investigations each year, a hundred-fold increase over historic norms."⁴⁵ This rise in unselective information gathering, using FISA to obtain domestic criminal information, increases the probability of discovering unintended charges that had nothing to do with the original investigations and criminal charges being levied against unsuspecting victims. As Senator Patrick Leahy (D-Vt.) has stated, this change "enters new and uncharted territory by breaking down traditional barriers between law enforcement and foreign intelligence."⁴⁶ The result further contributes to an unaware and unsuspecting public, never really knowing the extent they are being investigated, and to what degree their information is being shared and stored for possible future use.

The Patriot Act also expands the domestic power of the Central Intelligence Agency (CIA) by allowing the agency access to grand jury testimony. This is testimony previously held for use only in criminal cases and for "no other purpose".⁴⁷ It eliminates the requirement for agents to appear before the grand jury, essentially suspending due process. Section 203 of the act removes these restraints and provides the CIA the benefits of grand jury testimony without the

“protections of the criminal justice system”.⁴⁸ The National Security Act specifically directs that the CIA will have no domestic police or subpoena privilege. As Jim Dempsey, deputy director for the Washington D.C. based Center for Democracy and Technology has stated, “CIA agents could now use their close relationship with the FBI to essentially fill in subpoenas provided by prosecutors” without judicial approval and never be called to testify or be cross examined.⁴⁹ This expansion fundamentally changes the way our law enforcement agencies and foreign intelligence services are set up and directed to operate. While no specific evidence currently exists, it potentially jeopardizes due process and increases investigative reach while limiting oversight and eliminates previously established requirements for investigative authorization and approval.

Historical Examples of Legislation Infringing on Civil Liberties

“Throughout our history, the government has chosen to suppress individual liberties whenever it wages war.”⁵⁰ From the Alien Registration Act or Smith Act of 1940, McCarthyism in the 1950’s, through the Civil Rights era, to the administration of President Richard Nixon, federal law enforcement agencies have progressively directed warrant-less surveillance and searches in the name of national security. World War I saw Woodrow Wilson’s use of the Espionage and Sedition Acts to censor the foreign-language press and bar it from publishing anti-war sentiments. Approximately 2,000 people were prosecuted under the act, including Charles Schenck, who served 10 years in prison for distributing pamphlets claiming that the military draft was illegal.⁵¹ These acts were later repealed in 1921. Table 2 below is a historical list of several legislative acts that support the trend of overcompensating governmental actions enacted in times of crisis.⁵² Our nation has a history of quickly enacting overcompensating legislation only to have this legislation repealed or amended.

| Legislation | Result |
|---|--|
| Alien and Sedition Acts of 1798 | Expired in 1801 when the term of President Adams ended. |
| Sedition Act of 1918 | Repealed in 1921. |
| The Alien Registration Act or Smith Act of 1940 | Gradually ruled unconstitutional by the Supreme Court. |
| McCarran Act of 1950 | Vetoed by President Truman but overrode by Congress. Sections of the ISA were gradually ruled unconstitutional by the Supreme Court and repealed. |
| McCarthyism 1950’s (House Un-American Activities Committee) | Abolished by the House of Representatives committee in 1975. |
| Counter Intelligence Programs (COINTELPRO) 1956-1971 | Terminated in 1971 following the burglary of FBI offices by the Citizens’ Commission to Investigate the FBI and news agency reports of secret government dossiers. |

TABLE 2. EXAMPLES OF OVERCOMPENSATING LEGISLATION

Recommendations to the Patriot Act & Future Legislation

Polls indicate most Americans do not distinguish between the Patriot Act and the War on Terror. Most know little about this legislation and its implications in their daily lives but when they do learn more about the Patriot Act, their opinions change.⁵³ An August 2005 survey by the Center for Survey Research and Analysis at the University of Connecticut revealed that almost two-thirds of Americans (64%) support the Patriot Act. “Forty-three (43%) percent support the law’s requirement that banks turn over records to the government without judicial approval; Twenty-three (23%) percent support secret searches of Americans’ homes without informing the occupants for a period of time.”⁵⁴

It would be irresponsible to suggest that the Patriot Act be rescinded or completely rewritten. Much of the act is appropriate and necessary. As technology increases and threats to our nation change and develop, so too must the tools that laws enforcement agencies possess and utilize. There are five recommendations to the Patriot Act or future versions that, if adopted, provide better protection of our civil liberties yet equip our nation with the up-to-date tools and means necessary to meet domestic security threats.

First, lawmakers must include a proposal that would require the Justice Department to report their actions to Congress more frequently and require an annual report from the Attorney General. The report should specifically address the state of intelligence activities with respect to the use of the Patriot Act for investigative purposes including the Inspector General’s annual review of complaint cases. Increasing congressional oversight and engaging lawmakers more openly in the process better ensures an inclusive and bipartisan process that incorporates a more thorough set of checks and balances. This recommendation also creates shared responsibility across the executive and legislative branches of the government. It better prevents one branch of government from obtaining too much authority. The report should also include an independent study and research on the uses, impacts, and policy implications in terms of basic civil liberties for input to revisions of the act and associated laws.⁵⁵

Second, all National Security Letters that allow the government access to unlimited data bases, e-mail records and logs, financial records/data, and internet usage should require mandatory judicial review and approval. The holders of this information should also be able to challenge these requests in court to either limit or block the request and lift the gag order stipulation that would allow them to acknowledge the request.

Third, the standard for approving search and surveillance operations under the Patriot Act and FISA should revert to being the sole or “primary” purpose versus simply the “significant” purpose. Innocent people are likely to be labeled potential terrorists “based on what they check

out from a library.”⁵⁶ This reinserts a proven system of checks and balances instead of giving the FBI too much leeway to go in search of potential information instead of focusing on terrorist prevention.

Fourth, limit the definition of terrorism under the Patriot Act to exclude organized protesting against government policy and policy makers by domestic organizations, groups and individuals. As the Patriot Act is currently written, the definition of terrorism potentially limits citizen’s First Amendment rights and may deter citizens from publicly disagreeing with public policy and laws.

Lastly, lawmakers should keep sunset provisions in the Patriot Act for future examination and renewal instead of making them permanent. The fundamental changes in the way we collect domestic intelligence and criminal evidence warrants regular periodic review and analysis on the impact these procedures and authorities have on people’s civil liberties.

Conclusion

The American Civil Liberties Union (ACLU) has characterized the Patriot Act as an example of the government’s “insatiable appetite” for new powers under “secrecy, a lack of transparency, rejection of equality under the law, and a disdain and outright removal of checks and balances.”⁵⁷ Those who attempt to question the executive branch’s anti-terrorism program are often labeled as being soft on terrorism. This fear of labeling limits much needed debate on important and complicated legislation. It is unfortunate to learn of secret government programs from newspaper articles instead of these authorizations being debated and enacted by our lawmakers where government oversight and scrutiny is built into the system.

The United States does not rely on two Constitutions and multiple versions of the Bill of Rights, one for a time of war (crisis) and one for peace, to protect its citizens.⁵⁸ We did not fight a revolution for protection and security but for freedom, liberty, and limited government. The role of a limited government is to develop a foundation to protect human rights and to promote the common good. It is a constitutionally sound method of governing while a government, left unchecked, tends to descend toward authoritarian and totalitarian control.⁵⁹ The Patriot Act, utilizing a broader definition of terrorism, domestic terrorism, and foreign power; a more lax standard of probable cause for investigative approval; and far-reaching amendments of the FISA, will ultimately erode the civil liberties of the American people. Citizens need to be aware of the balance between government control and individual freedoms in order to prevent the government from exceeding its powers and controls. In a time of crises, the government’s pendulum swings to the right. An examination of history proves this to be true.

According to Congressman Ron Paul (R-Texas), "Every 20th century crisis ... led to rapid expansions of the federal government. The cycle is always the same, with temporary crises used to justify permanent new laws, agencies, and programs. The cycle is [now] repeating itself."⁶⁰

This is perfectly understandable, but our obligation must be to conduct thorough reviews of legislation under calmer conditions and make appropriate changes to these laws so they apply during both peacetime and times of national crisis. We need to establish standards, similar to the way Senator McCain recommended standards for the treatment of prisoners and detainees, which are uncompromising and protect both the legislation and those who enforce it. Our government and policy makers' vision, well intentioned and focused on a Global War on Terror, is blinded to the long term security of our nation. American policymakers must recognize that the danger posed by Al Qaeda is not a short-term crisis but a long-term security dilemma for the United States. If Congress rushes to enact overcompensating anti-terrorism legislation in the aftermath of every attack, chances are that history will be repeated and Americans' civil liberties over the long term may be eroded.⁶¹ Americans desire to be safe but not at the expense of becoming a surveillance state, one where personal actions become calculated for fear of being unknowingly watched and judged. Instead of improving our anti terrorism program, we have simply increased investigative powers and authorizations. We have eliminated effective checks and balances in the name of secrecy and fear of not preventing terrorism.

As Sen. Lindsey Graham of South Carolina stated when referring to the executive branch's authorization to bypass the FISA court in order to conduct domestic intelligence gathering, "We have to resolve the issue to show Americans we are a nation of law not outcomes."⁶²

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